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**UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION**

WILDEARTH GUARDIANS,	)	
Plaintiff,	)	Case No. 4:11-cv-05651-YGR
v.	)	
LISA P. JACKSON,	)	
in her official capacity as Administrator of the	)	
United States Environmental Protection Agency,	)	consolidated with,
Defendant.	)	

MIDWEST ENVIRONMENTAL DEFENSE	)	
CENTER, and	)	Case No. 4:11-cv-05694-YGR
SIERRA CLUB,	)	
Plaintiffs,	)	PLAINTIFFS' REPLY IN SUPPORT
	)	OF THEIR MOTION FOR
v.	)	SUMMARY JUDGMENT
LISA P. JACKSON,	)	
in her official capacity as Administrator of the	)	
United States Environmental Protection Agency,	)	NOTICED FOR HEARING:
Defendant	)	NOT CURRENTLY SCHEDULED

1 Before replying, Plaintiffs will first note that Plaintiffs believe that it is likely the parties  
2 will reach a settlement with regard to the outstanding issues in this case. However, the Court's  
3 September 10, 2012 Civil Minutes, Dk#61, states that Plaintiffs are to file their reply to cross-  
4 motion for summary judgment by 10/8/12 or Defendant will submit a stipulation resolving the  
5 case. The civil minute also states that no more extensions will be granted. As Defendant Lisa P.  
6 Jackson, the Administrator of the U.S. Environmental Protection Agency (EPA) is still working  
7 to obtain management approval of a settlement, Plaintiffs are filing this reply to ensure they  
8 comply with the Court's order.

9 Turning to the reply, although EPA's Notice of Cross Motion for Summary Judgment;  
10 Opposition to Plaintiffs' Motion for Summary Judgment; Memorandum in Support Thereof,  
11 [Dk# 44] (EPA Opp.) cites inapplicable law and admits facts that support Plaintiffs' Motion for  
12 Summary Judgment, at this point, it is most best if the Court enter the remedy EPA requested in  
13 its Opposition brief with one minor addition. Due to the passage of time, the remedies that  
14 Plaintiffs and EPA seek as to the failure to make a finding of failure to submit claim are probably  
15 almost equivalent. The remedy EPA seeks as to the failure to take final action on the Kentucky  
16 and Tennessee submittals is actually quicker than the remedy Plaintiffs asked for in its motion  
17 for summary judgment.

18 That is, the Court should enter summary judgment on liability for Plaintiffs on Claim One  
19 for EPA's failure to make a finding of failure to submit an Infrastructure State Implementation  
20 Plan (SIP) for Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia,  
21 Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan,  
22 Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico,  
23 New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode

1 Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia (for CAA  
2 section 110(a)(2)(D)(i)(I) only), Wisconsin, and Wyoming, which EPA refers to as the 40 states.  
3 The Court should require that by no later than January 4, 2013, EPA shall sign for publication in  
4 the Federal Register a notice or notices finding that the 40 states have failed to submit  
5 “infrastructure” SIPs for the 2008 ozone NAAQS. *See* EPA Opp. at 2 (requesting the same  
6 remedy).

7 Similarly, the Court should enter summary judgment on liability for Plaintiffs on Claim  
8 Three for failure to take final action pursuant to 42 U.S.C. § 7410(k)(2), (3) and/or (4),  
9 approving, disapproving or approving in part and disapproving in part the Kentucky and  
10 Tennessee 2008 ozone NAAQS Infrastructure submittals. The Court should require that by no  
11 later than January 4, 2013, EPA shall sign for publication in the Federal Register a notice or  
12 notices of final action pursuant to 42 U.S.C. § 7410(k)(2), (3) and/or (4), approving,  
13 disapproving or approving in part and disapproving in part the Kentucky and Tennessee 2008  
14 ozone NAAQS Infrastructure submittals. *See* EPA Opp. at 2-3 (requesting the same remedy).

15 In addition, although EPA did not mention it in its brief, the Court order should also order  
16 that after signing the final rules required by the Court’s order, EPA shall deliver notice of such  
17 actions to the Office of the Federal Register for review and publication within three business  
18 days after signature on each final rule. This requirement is important because it is the  
19 publication in the Federal Register, and not the signing of the rule, that provides the opportunity  
20 to challenge the substance of EPA’s final rules. *See* 42 U.S.C. § 7607(b). Considering EPA’s  
21 propensity for delay, it is not reasonable to assume EPA will actually complete the mandatory  
22 duties by timely forwarding the signed rules to the Office of the Federal Register for publication.

1 Plaintiffs agree to the relief requested by EPA because, at this point, it is similar or better  
2 than the relief Plaintiffs originally requested in their motion for summary judgment. In  
3 Plaintiffs' motion for summary judgment, Plaintiffs requested that the Court order EPA to make  
4 the finding of failure to submit within 30 days of the Court's order. At this point, it is likely that  
5 30 days after the Court issues a final order on summary judgment will be close to the January 4,  
6 2013 date EPA has requested.

7 As to the difference between the 40 states identified by EPA versus the 44 states  
8 identified by Plaintiffs in their summary judgment brief, at the time Plaintiffs' file their motion  
9 for summary judgment, the information EPA made publicly available indicated that Delaware,  
10 Idaho, Indiana, Oregon, and West Virginia (for CAA sections 110(a)(2)(A)-(C),(D)(i)(II), (D)(ii),  
11 (E)-(H), and (K)-(M) only) had failed to submit 2008 ozone Infrastructure SIP submittals. EPA  
12 has now updated that information to indicate that these states have submitted their 2008 ozone  
13 Infrastructure SIPs, or in the case of West Virginia, at least submitted parts. Plaintiffs do not  
14 dispute this new information and so no longer request the Court order EPA to make a finding of  
15 failure to submit for these states.

16 As to the claim regarding EPA's failure to take final action on the Kentucky and  
17 Tennessee submittals, Plaintiffs requested the Court order EPA to take final action within five  
18 months of the Court's order. EPA's requested date of January 4, 2013 is actually quicker than  
19 five months after the Court's order could be, even if the Court issued an order tomorrow.

20 Therefore, Plaintiffs respectfully request that the Court enter summary judgment as to  
21 liability for Claim One for Arizona, Arkansas, California, Colorado, Connecticut, District of  
22 Columbia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts,  
23 Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New

1 Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico,  
 2 Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia (for  
 3 CAA section 110(a)(2)(D)(i)(I) only), Wisconsin, and Wyoming and require that by no later than  
 4 January 4, 2013, EPA shall sign for publication in the Federal Register a notice or notices finding  
 5 that the 40 states have failed to submit “infrastructure” SIPs for the 2008 ozone NAAQS.  
 6 Similarly, the Court should enter summary judgment on liability for Plaintiffs on Claim Three for  
 7 EPA’s failure to take final action pursuant to 42 U.S.C. § 7410(k)(2), (3) and/or (4), approving,  
 8 disapproving or approving in part and disapproving in part the Kentucky and Tennessee 2008  
 9 ozone NAAQS Infrastructure submittals and require that by no later than January 4, 2013, EPA  
 10 shall sign for publication in the Federal Register a notice or notices of those final action. Finally,  
 11 the Court should order that EPA deliver notice of such actions to the Office of the Federal  
 12 Register for review and publication within three business days after signature on each final rule.

13 Respectfully submitted,

14 /s Robert Ukeiley

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Dated: October 8, 2012

CERTIFICATE OF SERVICE

I certify that on October 8, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court for the District of Northern California by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Robert Ukeiley  
Robert Ukeiley